STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
KENNETH DOYLE,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2005CA1776
	)	EEOC NO(S): 21BA50714
and	)	ALS NO(S): 07-689
	)	
T & H LEMONT,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 16th day of June 2011

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
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KENNETH DOYLE,	)	
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Complainant,	)	
	)	**Charge No.: 2005CA1776**
and	)	**EEOC No.: 21BA50714**
	)	**ALS No.: 07-689**
T & H LEMONT,	)	
	)	**Judge William J. Borah**
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On February 14, 2008, Lonny Ben Ogus, attorney, filed a complaint on behalf of Complainant, Kenneth Doyle, with the Illinois Human Rights Commission ("Commission"). Complainant alleged that Respondent, T & H Lemont, discriminated against Complainant on the basis of his age by eliminating his position.

This matter now comes to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response to the motion, and Respondent has filed a written reply to that response. In addition, all parties have submitted various documents including affidavits, employment policies, a payroll change notice, and certain responses to discovery.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this mater. The Department is therefore named herein as an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Complainant, Kenneth Doyle, was born November 29, 1953.

2. Complainant began his employment with T & H Machine Company, Inc., in 1992, and worked as a project and systems engineer and Director of Tooling Engineering until 1999.

3. In 1999, T & H Machine Company was purchased and renamed T & H Lemont, the Respondent.

4. Complainant continued his employment with Respondent in the positions of engineer and project engineer in the Roll Form Division.

5. Respondent had an Employee Handbook. The handbook included an "Equal Opportunity Policy," "Anti-Harassment Policy," "Rules and Regulations" and a "Disclaimer Policy." The "Disclaimer Policy" notified Respondent's employees that they were "at-will" and "could be terminated at any time, with or without cause and with or without notice, at the option of the employer..." and that the handbook was not an employment contract.

6. In 2002, Respondent's Roll Form Division was "shut down," and as a result, all of the positions within it were eliminated, including that of Complainant, who was 48 years old at the time.

7. Complainant was not laid off from Respondent despite his position being eliminated along with the Roll Form Division. Instead, in 2002, Respondent's president, John Hillis, age 50's, offered Complainant a newly created position of project manager in the Milling & Machine Unit. The position was intended to act as a liaison between tooling, sales, engineering and production, as well as to monitor and streamline production planning. Hillis was Complainant's direct supervisor.

8. In August 2004, Respondent's vice president of Mill Sales, Walter Heller, age 40's, communicated to Hillis that he was approached by a supervisory employee with a petition signed by "several key employees." The petition demanded that Complainant leave the company or the signees would resign. Heller told the employee to "throw away the petition,"

that he "...was not about to present any ultimatums to the president," and that he would discuss the matter with Hillis.

9. In August 2004, Heller met and discussed with Hillis Complainant's interpersonal relationship with Respondent's employees and the petition. As a result of the conversation, Hillis conducted an informal investigation ("survey") of Complainant's behavior. The Hillis investigation included complaints from the Tooling Department supervisor and the Tooling Business Unit Sales Manager, among other employees. Complainant's management style was described as "disruptive" and a "harassing and abusive manner."

10. Hillis also investigated Complainant's position of project manager in the Mills & Machine Unit to determine whether or not it was meeting its original expectations set in 2002. Hillis concluded the position was neither effective nor profitable.

11. On or around September 3, 2004, Complainant's position of project manager, which was created "just over a year" before by Hillis, was eliminated by him. Hillis's reasoning was, "This was in part due to Complainant's behavior, and in part, due to no substantive improvement in delivery performance or cost."

12. On or around September 3, 2004, Complainant was informed of Respondent's decision by Hillis, as witnessed by Gary Seebert, age 50's, Respondent's business manager. Complainant was also told about the Hillis's investigation concerning his behavior and the petition, but was not shown a copy of it.

13. Pete Gounelis, age 28, was Complainant's assistant.

14. In September 2004, Gounelis remained with Respondent as an assistant, but was assigned to another supervisor in a different department.

15. Gounelis was given a raise from $13.50 per hour to $14.50 per hour for a gross annual salary of $27,840.00. Complainant was a salaried managerial employee at $78,000.00 annual gross wages.

CONCLUSION OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a *prima facie* case of discrimination against him on the basis of his age.

4. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

5. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

6. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove his case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be

considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

STANDARD FOR PROVING AGE DISCRIMINATION UNDER THE ACT

Complainant alleges that Respondent discharged him from his employment due to his age. There are two methods for proving employment discrimination, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill.App.3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement by Respondent that Complainant's position was being eliminated or he was being disciplined because of his age), the indirect analysis is appropriate here.[1]

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If he does, then Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance of evidence that Respondent's articulated reason is merely a pretext for unlawful discrimination.

[1] See the discussion on Complainant's allegation of Respondent's president's comment referencing Respondent's health care premiums with "older workers."

Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

Where, however, the legitimate, non-discriminatory reason for the employment action has been made clear, it is no longer necessary to determine whether a *prima facie* case has been made. Since the only purpose of a *prima facie* case is to determine whether the Respondent has to articulate a legitimate reason for its action, it becomes perfunctory to analyze the matter in terms of a *prima facie* case if the legitimate, non-discriminatory reason for the action has already been articulated. Bush and The Wackenhut Corporation, IHRC, ALS No. 1673, July 30, 1987, quoting U.S. Postal Service v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983). Federal cases which decide analogous questions under Federal law are helpful but not binding on the Commission in making decisions under the Illinois Human Rights Act. City of Cairo v. FEPC, 21 Ill.App.3d 358 (1974).

By definition, proof of a *prima facie* case raises an inference that there was discrimination. By articulating a reason for the employment action in issue, the Respondent destroys the inference. At that point, the question becomes whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Id.

Direct Method

Complainant inserted in his written response an alleged isolated statement made by Respondent's president, John Hillis, '...in either 2000 or 2001, ...that one of the reasons that health care premiums were high was that the high number of older workers put the company in a less favorable premium bracket." The alleged statement was submitted without any explanation of its context or relationship to Respondent's decision to eliminate Complainant's position on or around September 3, 2004.

"The comments must have been made contemporaneously with the employer's decision or be causally related to the decision...Stray remarks, including isolated statements, statements by non-decision makers, or statements by decision makers unrelated to the decisional process

itself, are insufficient to establish discrimination...Vague or ambiguous comments do not give rise to an inference of discrimination." Sola v. Illinois Human Rights Commission, 316 Ill.App.3d 528, 736 N.E.2d 1150 (1st Dist. 2000).

Hillis's alleged comment was made two or three years prior to his decision to create Complainant's position and, over a year later, to eliminate that same position. Standing alone, without discussing how it was in fact a "smoking gun" comment of age discrimination, Hillis's statement fails as direct evidence of discrimination.

In Robin v. ESPO Engineering Corporation, 200 F.3d 1081 (7th Cir. 200), two remarks referenced the Plaintiff as an "old S.O.B," and "getting too old." However, because the comments were made two years prior to the decision to terminate him, it was found that they "lacked temporal proximity to the employment decision..."

The Plaintiff in Robin, like the Complainant in this case, too, failed to "causally relate [the comments] to the discharge decision making process," either by nexus or timeliness. Therefore, a review of indirect proof of discrimination remains.

Background Facts

Complainant was born on November 29, 1953, and began his employment with T & H Machine Company, Inc., in 1992. Complainant worked as a project and systems engineer and also as Director of Tooling Engineering until 1999. In that year, T & H Machine Company was purchased and renamed T & H Lemont, the Respondent. Complainant continued his employment with Respondent in the positions of engineer and project engineer in the Roll Form Division. Respondent's president, Hillis, was Complainant's immediate supervisor.

In 2002, Respondent made a business decision and closed its Roll Form Division. As a result of this action, all of the positions within the division were eliminated, including that of Complainant. Complainant did not contest the division's closure or its consequential lay offs as discriminatory.

Instead of laying Complainant off after closing Roll Form Division in 2002, Hillis created a new position of project manager in the Mills & Machine Division and offered it to Complainant, who accepted the position. Complainant was 48 years old. Hillis continued to be Complainant's immediate supervisor. The position was intended to act as a liaison between tooling, sales, engineering and production, as well as to monitor and streamline production planning.

In August 2004, less than two years after Complainant accepted the new position, Walter Heller, late 40's, Respondent's vice president of Mill Sales, was approached by Respondent's Sales Manager, Robert De, mid 50's, with a petition signed by "several key employees." As per Heller's affidavit, the petition demanded that Complainant leave the company or the signees would resign. Heller directed De to "throw away" the petition, that he "was not about to present any ultimatums to the President," but he promised to discuss the matter with Hillis.

As per Hillis's affidavit, Heller met and discussed with him Complainant's interpersonal relationship with Respondent's employees and the petition. As a result of the conversation, Hillis decided to conduct an informal "survey." Complainant's management style was described to Hillis by Bob Wolford, age 50's, Respondent's tooling department's supervisor, as being one of "constant disruptive behavior." De advised Hillis that Complainant was "counterproductive and [had a] disrespectful behavior." Based on Hillis informal "survey," he described Complainant's managerial style with co-employees a "harassing and abusive manner."

The Hillis investigation concluded, "...after speaking with several employees that the position I had created for the Complainant over one year ago was ineffective. This was in part due to Complainant's behavior and in part due to no substantive improvement in delivery performance or cost. Since this Business Unit continued to be historically unprofitable I decided to eliminate the position."

In his affidavit, Hillis claimed to have "consulted" Complainant about his conduct toward employees. However, no document existed in Complainant's personnel file that was of a negative nature. Complainant denies any "consultation" took place.

On or around September 3, 2004, the Complainant was separated from his employment. Complainant held the newly created position for the life of it, "over a year", and he was merely a year older. During the separation meeting with Hillis and Seebert, Complainant was told about his harsh management style, the petition and job elimination. Complainant denied he was "told" about his position being eliminated.

Pete Gounelis (a/k/a Panajoiti Gounelis) was Complainant's assistant, 28 years old, an hourly employee earning $13.50 per hour. Complainant was a project manager with supervisory authority, and a direct corporate structural line to the president of Respondent, Hillis, his immediate supervisor. Complainant was a salaried supervisor earning $78,000.00 a year.

Complainant alleged Gounelis received his responsibilities after Complainant's job was eliminated. Respondent, through the affidavits of Hillis and Seebert, contended Gounelis was transferred to another department, continued his position as an assistant with a different supervisor, and was given a raise to $14.50 per hour.

Indirect Method

Complainant must give some evidence that his age, 50, was the "determining factor" in the "sense that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age." Wellman and Schaumburg Transportation Company, IHRC, ALS No. 2956, February 1, 1991, quoting Loeb v.Texron, Inc. 600 Fed 2d 1003 (1st Cir. 1979).

This is not a case where Complainant's age became significant over a long period of time. Complainant was merely one year older from when he was offered the newly created managerial position in 2002. He was discharged in 2004. In fact, Hillis was the same person

who created, offered and eliminated Complainant's position. The men were contemporaries in age.

There is no argument that the Respondent had the authority to and did eliminate the Roll Form Division in August 2002. At that time, Complainant could have been laid off but for Hillis's intervention. The length of time a person served and who hired and discharged the party are factors in this case. For example, in Wilson and RFMS, Inc. d/b/a Seminary Manor, IHRC, ALS No. 3951, September 29, 1994, the decision noted that it was only six months from the time the complainant was hired to her discharge.

Hillis created Complainant's position in 2002 in order to "improve communications between sales, engineering and production..." However, "In the winter of 2003 and spring of 2004, I [Hillis] became aware that there were problems within the Tooling Business Unit due to Complainant's harassing and abusive manner." Hillis learned of Complainant's behavior through Bob Wolford, the tooling department's supervisor, Rob De, the Tooling Business Unit sales manager, and Bud Heller, vice president of Mills and Machines, who also advised him in August 2004 of the petition. Each supervisor was Complainant's contemporary.

Hillis decided to eliminate Complainant's position in September 2004. "This was in part due to Complainant's behavior and in part due to no substantive improvement in delivery performance or cost."

Complainant alleged that the elimination of the position was because of his age, and Respondent's reasoning a pretext. Complainant cites hearsay statements of Respondent's supervisors. No petition was submitted or produced and no discipline notices were in his personnel file. Complainant argued that he was not "told" that is job was eliminated at his September 6, 2004, separation meeting.

An employer may offer testimony concerning a conversation in order to establish what information was relied upon in reaching a termination decision. Regan v. Acme Steel Company, IHRC, ALS 5609, July 24, 1998, cited Estate of Parks v. O'Young, 289 Ill.App.3d 976, 682

N.E.2d 466 (1st Dist.1997). "...an employer is not a court and it is free to conduct its business based upon hearsay sources of information." Id. The Appellate Court held that the question is not whether the heads of the other departments told the truth, but whether they did, in fact, express dissatisfaction. "... It is irrelevant to the discrimination claim whether the department superintendents were lying or telling the truth. If the superintendents did express dissatisfaction... this would tend to show that the discharge decision was not based on age...the question is...whether these conversations took place." Id.

Hillis's investigation, which included comments from supervisory personnel and Heller's representation that a petition existed demanding Complainant's removal from his position, are acceptable factors in reaching a termination decision, as long as age was not a determining factor for Complainant's separation.

Complainant did not lose the status of "employment at will" as repeated in Respondent's handbook under its "Disclaimer Statement." "...I understand that I could be terminated at any time, with or without cause and with or without notice, at the option of the employer or employee..." Respondent had no obligation to communicate the cause of the separation with Complainant or show him the petition during the September 3 or 6, 2004, meeting, or use progressive discipline. Complainant had no employment contract.

The signed petition was used as one reason for Complainant's discharge, as were a number of other complaints about his behavior. As such, Respondent's reasoning was related to Complainant's competence as a manager. Complainant's negative managerial style was a theme written in the affidavits of Hillis and Heller, as well as told by those supervisory employees who contributed to Hillis's investigation. "This Commission has recognized that subjective factors like predicted 'managerial competence' may be legitimate grounds for employment decision, particularly in the area of supervisory or managerial positions." Wilson and RFM, Inc., d/b/a Seminary Manor, IHRC, ALS No. 3951, September 29, 1994.

Respondent's second reason for eliminating the position was that it proved not to be effective in light of Hillis's goals in 2002. Respondent stated the goal of efficiency "was not seen on any sustained basis."

Complainant responded that "there is no evidence whatsoever to corroborate it." There were no reports, documents or statements. "One would think that for a business of Respondent's size and nature, all of these claims would have been documented.... [thus] creates the inference that they are not the true reason for Complainant's termination."

"The Commission cannot substitute its business judgment for that of the Respondent...It would be improper for me to find that a reduction in force or any other employment action was unnecessary, or in bad judgment." Andrus and State of Illinois, Department of Public Aid, IHRC, ALS No. S-7957, January 12, 1999. Although the "soundness of a given business decision can be related to the issue of pretext" it must be because that the business decision is not the real reason." Id. "Pretext means a lie..." Aguilera v. Village of Hazel Crest, 234 F.Supp. 840 (N.D.Ill. 2002).

Complainant criticizes Respondent's record keeping procedures and lack of documentation. Complainant also denies there was any problem with fellow employees, except for De.

The question is "whether the employer's stated reason was honestly believed, and not whether it was accurate, wise or well considered." Stewart v. Henderson, 207 F.3d 374 (7th Cir. 2000). "Even if Complainant can show that Respondent's articulation was a lie, this does not mean that Complaint has prevailed..." Complainant has to show discriminatory motive. In Barz and Electro Motive Division of General Motors Corp., IHRC, ALS No. 10177, December 1, 1999, Complainant Barz failed to prove that the respondent's proffered reason for reducing her hours, while untrue, was a pretext for discrimination.

Here too, in this case, the question is whether Complainant has satisfied his burden of presenting some evidence that Respondent's reasons for his termination are a mere pretext for

age discrimination. To that end, it is important to recall that it was Complainant's burden to present some evidence that age was the real reason for his firing, not Respondent's burden to show that it was not. The issue is not solely about the lack of documentation or draconian bosses, but about presenting some evidence of age discrimination.

The Complainant offered no evidence as to why age discrimination was the more likely reason for Respondent's actions. Respondent's president, Hillis, listened to the opinions of Heller, Wolford and De, Respondent's supervisors. Hillis also believed the petition existed as represented by Heller, that it was signed by key employees of Respondent, and that the ultimatum was real. After Hillis's informal "survey," he unilaterally concluded that Complainant's managerial style was "abusive" and that the position was not effective. Hillis is the same person, who two years earlier, could have laid off Complainant, but decided to create a new position for him.

Finally, Complainant alleged that Pete Gounelis, age 28, took over his responsiblities. However, Complainant was a salaried management employee, with a direct corporate line to the president. On the other hand, Gounelis was an hourly employee earning $13.50 a hour, and had duties as an assistant to a supervisor. After Complainant's position was eliminated, Gounelis was transferred to a different department, remained as an assistant to another supervisor, and earned $14.50 per hour. Complainant has failed to offer any evidence that Gounelis was an example of an employee similarly situated to Complainant.

Even if Gounelis performed Complainant's duties, as implied, the Commission and the courts have previously held that it is not age discrimination for an employer to eliminate a position held by an older worker and reassign those duties to a younger worker. Naselli and Courtesy Manufacturing Col, IHRC, ALS No. 8456, October 2, 1997, quoting Holley v. Sanyo MFG., Inc., 771 F.2d 1161 (8th Cir. 1985). "Thus, from the standpoint of the Commission, an employee whose job was eliminated by an employer and whose duties were assumed by another employee would be required to show in an age discrimination case that he was denied

the consolidated position, despite his greater expertise, solely because of his age." Id. Here, Complainant's position was eliminated and Gounelis remained an assistant to another supervisor in a different department at an hourly wage.

Although Complainant's affidavit lists duties he taught Gounelis, Complainant failed to show age was the reason for the alleged transfer of any perceived duties.

"Neither presenting a scintilla of evidence, nor the mere existence of some alleged factual dispute between the parties nor some metaphysical doubt as to the material facts is sufficient to oppose a motion for summary judgment. The party must supply some evidence sufficient to allow a jury to render a verdict in his favor." Robin v. Espo Engineering Corporation, 200 F.3d 1081 (7th Cir. 2000).

Although he presented a thorough response, Complainant still falls short of presenting some factual basis that would create a triable issue on the question of whether Respondent's articulated reason for its decision to terminate Complainant was a pretext for age discrimination.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the Complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: September 8, 2010